

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
APPENDIX**





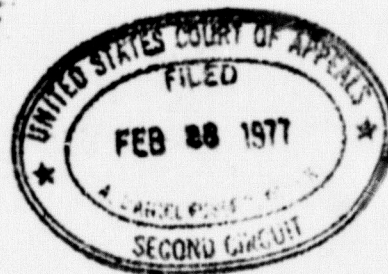
Docket No. 76-7545

76-7545

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

MacMILLIN CO.                     )  
  v.                     )  
IVOW CORPORATION                )     NO. 76-7545

APPENDIX



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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

THE MACMILLIN CO., INC.

v.

IVOW CORPORATION & WILLIAM SZIRBIK

DOCKET NO. 76-7545

Appeal  
from the

United States District Court  
for the District of Vermont

---

APPENDIX

---

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RELEVANT DOCKET ENTRIES

Complaint Filed	November 21, 1973
Answer Filed	December 12, 1973
Pre-Trial Order Filed	March 22, 1976
Findings of Fact & Conclusions of Law Filed	June 25, 1976
Judgment Entered	September 24, 1976
Notice of Appeal Filed	October 26, 1976

RELEVANT PORTIONS OF FINDINGS OF FACT  
AND CONCLUSIONS OF LAW

[See Page 2a]

\* \* \*

"The court's jurisdiction is invoked under 28 U.S.C.  
§1332 (1970)."

[See Page 2b]

\* \* \*

"The defendant I.V.O.W. (sic) is a Vermont corporation with its principal place of business in Manchester, Vermont; it owns and operates a shopping center at that location.

"During the early months of 1972 the principal local officers of I.V.O.W. (sic), William Szirbik, treasurer, and Virginia Szirbik, president, actively explored the project of constructing an addition to the existing shopping center. Mr. Szirbik has had extensive experience over many years as a building contractor. In recent years he has been engaged as a real estate developer in the area of Manchester, Vermont. After answering advertisements from several 'pre-engineering' structural steel contractors in the spring of 1972, the defendant received responses from Etbro Construction Company of Rutland, Vermont, and the plaintiff, a New Hampshire corporation with its principal place of business in Keene, New Hampshire.1/"

[See Page 2c]

\* \* \*

"In May of 1972, in response to the solicitation of I.V.O.W. (sic), Allan McAnney, vice president of the MacMillan (sic) Company, first met with the Szirbiks at the offices of I.V.O.W. (sic) in Manchester, Vermont, to discuss the construction project.



Insert - Page 2

"The plaintiff MacMillan Company has brought this action against the I.V.O.W. Corporation to recover compensatory and punitive damages incurred as a consequence of the defendant's unauthorized use of certain plans, prepared by MacMillan, for the construction of an addition to a shopping center owned by I.V.O.W. MacMillan contends that the defendant's improper use of its plans infringed MacMillan's common law copyright in the plans, and unjustly enriched I.V.O.W. at the expense of the plaintiff."



Insert - Page 2

"At the close of the evidence the plaintiff moved to join William Szirbik, in his individual capacity, as a defendant in the action under Fed.R.Civ.P. 20(a). A corporate officer can be held liable for a tort in which he personally participated and the person wronged may proceed against him, although the corporation may also be liable. New England Acceptance Corp. v. Nichols, 110 Vt. 478, 488 (1939). William Szirbik was personally involved in the tortious conduct of the corporation and a joint tortfeasor with the corporation. He was the only officer of the defendant who appeared as a witness at the trial. He was present as the corporate representative of the defendant at the counsel table and actively participated throughout the entire proceeding. It appears that William Szirbik will not be prejudiced by his joinder, albeit at a late stage of the proceedings. His joinder may well obviate the necessity for further litigation of the same issues. See C. Wright and A. Miller, Federal Practice and Procedure § 1688. The plaintiff will be permitted to join William Szirbik as a defendant. Cf. H. M. Kolbe Co. v. Shaff, 240 F. Supp. 588 (S.D.N.Y. 1965).

"From the evidence presented to the court, sitting without a jury, the court finds the facts which follow."

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"William and Virginia Szirbik met initially with Robert Ettori of Etbro Construction in April of 1972 to discuss plans and a cost proposal for construction of the shopping center addition. The expansion contemplated at that time was limited to the construction of a single store of approximately 10,000 square feet for lease to the Ben Franklin Store. At the meeting the Szirbiks presented Ettori with the written specifications and layout designs for the Ben Franklin Store and some rough hand-drawn sketches of their concept of the project. (Plaintiff's Exhibit 27.) Following that brief meeting, Robert Ettori and the Szirbiks did not meet again to pursue the project until November 25, 1972."



The prior consultation with Ettori was not disclosed. McAnney, an architectural draftsman by training, was a member of the 'pre-engineering' division at MacMillan (sic), which publicized and marketed a building system under which the structural steel manufacturer offers standard-sized, pre-cut - 'pre-engineered' - building components. A pre-engineered structure was suggested by McAnney to the Szirbiks to meet the needs of I.V.O.W. (sic) at the lowest possible cost. At the meeting the Szirbiks expressed interest in pursuing the construction of a pre-engineered addition to the shopping center. In their discussions with McAnney they conveyed their general notions concerning how they envisioned an enlarged shopping center could be accomplished. McAnney was also given a plot plan of the shopping center, prepared by an architect, Fritz Dillman, in 1966, and a set of the specifications and layout designs for the Ben Franklin Store. As a result of this meeting McAnney was led to believe that I.V.O.W. (sic) wanted the plaintiff to propose plans for an addition to the shopping center and to submit a price for the proposed project to I.V.O.W.2/"

"Immediately after that meeting McAnney conducted an inspection of the building site and made some preliminary measurements of the building which was occupied by 'Super Duper' Market, adjacent to the area of the proposed addition. After McAnney had worked up some sketches of a proposed addition for I.V.O.W. (sic), the 'Super Duper' chain indicated its desire to expand its existing store, changing the criteria for the project. This

required further consultations between McAnney and William Szirbik to accomplish solutions to a number of problems incident to the proposed project. The defendant required the structure to be located on a site that would avoid encroachment into the parking area within the property boundaries; a roof design that would minimize the tenant's heating costs, yet remain compatible in appearance with the existing stores in the shopping center; and a roof design to allow for snow and rain drainage to guard against accumulations. Preliminary drawings, presenting McAnney's resolution of these problems, were submitted to I.V.O.W. (sic) on August 11, 1972 (Plaintiff's Exhibit 2).

"At a meeting early in September with the Szirbiks, Allan McAnney made an effort to reach a firm agreement on the final project plans and to confirm the business relationship between the parties. It was the general policy of MacMillan (sic) to prepare a preliminary layout and price for a prospective client without cost, but not to proceed beyond that point without compensation. McAnney prepared a commitment letter (Plaintiff's Exhibit 3) based on his layouts and a price estimate for the project as it was planned at that point in time. It was his purpose to have Szirbik approve this arrangement which would have committed I.V.O.W. (sic) to absorb any further costs incurred by MacMillan (sic) in preparing final drawings and specifications.<sup>3/</sup> The dimensions of the addition, however, were again changed by I.V.O.W. (sic) at that meeting. Since the commitment letter was based on plans which did not include those changes, it was withheld and not submitted to Szirbik for signature. Its contents,



nonetheless, were discussed with Mr. Szirbik and he offered no objection to the proposal.

"Since the Szirbiks indicated to McAnney that MacMillan (sic) was the only builder being considered for the project and that I.V.O.W. (sic) was satisfied with MacMillan's (sic) proposal, McAnney understood that I.V.O.W. (sic) was seeking a negotiated price contract. Consequently, he did not press for a written commitment from I.V.O.W. (sic) to pay for the cost of final plans and specifications.

"At this point in time the acts and representations of the defendant's treasurer induced McAnney to justifiably believe that MacMillan (sic) Company would be engaged to provide the materials and perform the construction work necessary to complete the addition to the shopping center. On the strength of this understanding, MacMillan (sic) undertook and completed the final plans and specifications.

"Within several weeks McAnney prepared and submitted to I.V.O.W. (sic) further working drawings, including the most recent changes in the project. Some delay in preparing the final drawings was interposed when it was discovered that the plot plan, provided by Szirbik to McAnney, was inaccurate. Another survey was done by Stewart Dauchy to establish accurately the rear lot line. While awaiting MacMillan's (sic) final proposal, William Szirbik submitted copies of the preliminary plans to prospective tenants and to a bank for their approval.<sup>4</sup>/ By letter dated October 30, 1972, William Szirbik requested additional copies of the plans for the tenants and the bank. McAnney complied. In the letter Szirbik also urged:"

[See Page 5a]

\* \* \*

"At some time early in November, McAnney completed his final working drawings of the proposed addition and submitted them to I.V.O.W. (sic) (Plaintiff's Exhibit 7). The drawings, characterized by two of the architects testifying in the case as working drawings, embodied MacMillan's (sic) unique and innovative solution to the several problems posed by the project. The final plans proposed a pre-engineered, flat-roofed steel structure with a false roof (giving the illusion of a peaked roof so as to appear compatible with the existing buildings in the center). The proposal consisted of six separate drawings: (1) a plot plan and a roof plan; (2) the foundation plan; (3) the floor plan; (4) cross-section of the roof facade; (5) exterior elevations and (6) cross-sections of the walls of the building.<sup>5/</sup> These plans were sufficiently detailed as to permit MacMillan (sic) to construct the pre-engineered structure directly from the plans.<sup>6/</sup>

"It appears that the Szirbiks provided Allen McAnney with many suggestions and some rough sketches to express their wishes in the design of the proposed addition. MacMillan's (sic) final proposal was primarily the original intellectual product of Allan McAnney.<sup>7/</sup>"

[See Page 6b]

\* \* \*

"McAnney, accompanied by a friend, Susan Brown (now Hessle-ton), delivered the proposed negotiated price contract, two sets of final working drawings and 13 pages of specifications to William and Virginia Szirbik at their I.V.O.W. (sic) offices on Friday, November 24, 1972 . . . Virginia Szirbik undertook to



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"'I hope you are progressing with the plans and proposal with which you can undertake the initial construction phase. Just as soon as you can, get the proposal to us so we can act and get approval.'"

"Plaintiff's Exhibit 4.)"

Insert - Page 6

"On November 15, 1972, Allan McAnney hand delivered a letter to William and Virginia Szirbik at their office in Manchester, Vermont, which proposed a cost of \$169,757 for construction of the addition. The Szirbiks expressed satisfaction with the proposal as set forth in the drawings, but suggested to McAnney that the price could be reduced by some eliminations. On returning to his home office, McAnney was able to reduce the price to \$166,032 by cutting back the overhang of the roof and specifying that I.V.O.W., instead of MacMillan, provide certain grave fill. This adjustment was related to William Szirbik by telephone on November 20, 1972. Szirbik expressed his approval to McAnney and asked McAnney to prepare a final contract based on the \$166,032 figure."



telephone one of their partners who was a principal stockholder in I.V.O.W. (sic), a Mr. Slutzky in New York, to obtain his approval before entering into the contract. Since he could not be reached, the Szirbiks retained the documents. In so doing, the Szirbiks assured McAnney that they would review the proposal with Mr. Slutzky over the weekend and then notify McAnney to enable MacMillan (sic) to proceed expeditiously with construction. Neither of these assurances were fulfilled by the Szirbiks.

"Allan McAnney and Susan Brown departed from the meeting with substantial assurance of a final contract. Immediately after their meeting William Szirbik was in communication, by telephone, with Robert Ettori of Etbro Construction Company. He was informed there was progress in the project and was invited to come to the Szirbik home the next day to discuss some plans I.V.O.W. (sic) had formulated since their previous meeting seven months earlier.

"Ettori met with the Szirbiks the following day, November 25, 1972, at the Szirbik's residence in Dorset, Vermont. He was asked to put together a price for construction of the addition based on a set of plans given to Ettori by William Szirbik. These plans were the working drawings for MacMillan's (sic) proposal, given to Szirbik earlier in the month by Allan McAnney. The title blocks of the drawings, which indicated they were prepared by MacMillan (sic), had been excised by Szirbik. The 13 pages of specifications, submitted by MacMillan (sic) the day before, were also shown to Ettori.

"With the guidance of the MacMillan (sic) plans, Ettori was able to compute a price proposal for I.V.O.W. (sic) in about two



weeks. Ettori testified that in pricing the project, based on the plans provided to him, he was confronted with no design problems. Had the plans not been available to him, Ettori would not have been able to arrive at an accurate construction price in such a short period of time. The initial price submission by Ettori was \$165,000. After some negotiating and cost-cutting, I.V.O.W. (sic) agreed with Ettori on a figure of \$155,000."

[See Pages 8a & 8b]

\* \* \*

"Early in 1973 Robert Ettori, at his own expense, retained Crandell Associates, an architectural firm in Rutland, Vermont, to develop final plans for the project. Ettori gave Clarence Whitney, an associate in the firm, a set of the MacMillan (sic) drawings to assist him in the preparation of his plans. By use of the drawings and concepts expressed in MacMillan's (sic) plans (Plaintiff's Exhibit 11), Crandell prepared further plans for the construction of the addition (Plaintiff's Exhibit 12). Crandell's final version of the addition modifies the MacMillan (sic) plans in many respects, since the Crandell plans were not a pre-engineered structure. However, it was admitted by Crandell's architect that the MacMillan (sic) plans were useful in Crandell's preparation of its drawings.<sup>9</sup>/ Crandell billed Etbro Construction Company approximately \$3,000 for its plans."

[See Page 8c]

\* \* \*

"The court finds that the reasonable value of the plaintiff's services in designing, preparing the plans and specifications requested by the defendant is \$12,500. This amount is supported



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"On December 15, 1972, the defendant used a copy of MacMillan's working drawings to support I.V.O.W.'s application for an Act 250 permit before a hearing on the State of Vermont District Environmental Commission. MacMillan was not consulted nor advised that I.V.O.W. used MacMillan's plans to support its Act 250 application. I.V.O.W. did not reveal that it submitted MacMillan's plans and specifications for the use of Etbro Construction Company.

"Meanwhile MacMillan awaited a response from I.V.O.W. on its final proposal. Allan McAnney tried on numerous occasions to communicate with Szirbik at I.V.O.W.'s office in Manchester to no avail. Finally, on December 20, 1972, McAnney wrote William Szirbik, inquiring of I.V.O.W.'s intentions with respect to the MacMillan contract proposal. The letter also requested, in the event I.V.O.W. had decided to discontinue its dealings with MacMillan, that Szirbik return MacMillan's proposal documents, including both copies of the plans, specifications and the contract (Plaintiff's Exhibit 10).

"At a meeting of building contractors, during the first week of January in 1973, Allan McAnney happened to meet Robert Ettori. During the course of their conversation, McAnney discovered from Ettori that Etbro Construction Company was going to build the addition to the Manchester shopping center for I.V.O.W. He further learned that Ettori had been furnished drawings by William Szirbik for the purpose of preparing a bid on the project. Shortly thereafter McAnney visited the Etbro

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Construction Company office in Rutland. His suspicion that the plans provided to Etti were the MacMillan working drawings was confirmed.

"Late in January MacMillan's attorney, reiterating the request made by McAnney a month earlier, demanded return of the drawings, specifications and contract. Finally, on the fifth of February, Szirbik's attorney returned the plans requested (Defendant's Exhibit N). <sup>8/</sup>"



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"Etbro Construction Company completed construction of the addition to the shopping center in September, 1973. Two months later this action was brought to recover for the improper use and appropriation by the defendant of the plans prepared by the plaintiff."

by the expert opinion evidence presented at the trial and is consistent with the understanding which the defendant's managing officer, Szirbik, led the plaintiff to believe would be acceptable. This amount also equates with the cost advantage which the defendant derived from use and leverage afforded by the defendant's appropriation of the plaintiff's work product."

[See Pages 9a & 9b]

\* \* \*

"The plaintiff engaged no architect, registered in Vermont, during the time in 1972 when it prepared the plans for the Manchester shopping center addition."

[See Page 9c]

\* \* \*

"The defendant's reliance on Rodgers v. Kelley, 128 Vt. 146 (1970) and Markus & Nocka v. Goodrich, 127 Vt. 404 (1969) that the statutory law of Vermont precludes recovery by the plaintiff, on any theory, is misplaced.

"Markus & Nocka was a Massachusetts architectural firm retained by a resident architect as consultants in planning and designing proposed hospital construction in Vermont. No members of the plaintiff's firm were authorized to perform architectural services in Vermont under the provisions of 12 VSA §§122,123 and 207. The action was brought on an architectural contract performed in Vermont. The Vermont Supreme Court held that the contract was in violation of the statute and unenforceable in the Vermont courts. The present action is not founded on a contract to perform architectural services, nor is the plaintiff's claim founded on a contractual undertaking.



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CONCLUSIONS

"I.V.O.W. resists recovery by MacMillan on any theory on the contention that the activities of the plaintiff in preparing the plans, specifications and drawings for I.V.O.W. constituted a violation of the Vermont statute governing the licensing of architects, 26 V.S.A. § 121 et seq.

"The Vermont statutory law, upon which the defendant relies, provides:

The term "architect" or "registered architect" as used herein shall mean a person who holds himself out as able to perform, or does perform, while representing himself as an architect, any professional service such as consultation, investigation, evaluation, planning designing (including esthetic and structural design), or responsible supervision of construction in connection with any buildings, structures, or projects, or the equipment or utilities thereof wherein the safeguarding of life, health, or property is concerned or involved.

26 V.S.A. §121.

This chapter shall not be construed to affect or prevent the practice of engineering by a professional engineer duly licensed under the laws of this state, nor to apply to any person licensed as a professional engineer in this state except that such persons shall not use the designation architect, architectural, or architecture unless licensed under the provisions of this chapter; nor to prevent the preparation of working drawings, details and shop drawings by persons other than architects for use in connection with the execution of their work; nor to prevent employees of those lawfully practicing as architects under the provisions of this chapter from acting under the instruction, control, or supervision of their employers; nor to apply to the supervision by builders or superintendents employed by such builders, of the construction or structural alteration of buildings or structures; all provided, however, that nothing herein contained shall be construed to permit any person not licensed as provided in this

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chapter to use the title architect, or any title, sign, card, or device to indicate that such person is an architect.

26 V.S.A. § 124.

No person shall use the title architect, or any sign, card, or device to indicate that such a person is an architect, unless such a person shall have secured a certificate of registration from the board in the manner herein provided.

26 V.S.A. § 207."



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"Defendant contends that the plaintiff's plans and specifications were architectural in nature, thus within the proscriptioin of the licensing statute. Since they were not prepared by a properly licensed architect, defendant argues an action to recover for those services is foreclosed.

"The legislation recognizes that in the construction industry there are occasions when the work of an architect and the work of an engineer or builder may overlap. This possibility is recognized in the provisions of Title 26 of the Vermont Code dealing with the licensing requirement of these professions. 26 V.S.A § 124 exempts certain services of an architectural nature performed by engineers or builders from the licensing requirements of architects; 26 V.S.A. § 1054(8) reciprocates, exempting architects from the licensing requirements of engineers in certain circumstances.

"Although the scope of this exemption has not been delineated by the Supreme Court of Vermont, a number of jurisdictions with licensing laws, similar to the Vermont scheme, have given a liberal reading to similar exemption provisions. See Jones v. Spindel, 196 S.E.2d 22, 29 (Ga. App. 1973) (and cases cited)."

"The plaintiff in Rodgers v. Kelley advanced various claims, including an action in contract to recover for architectural services furnished by the plaintiff on an oral contract with the defendants. Again the plaintiff was not registered as an architect under the Vermont statute. The court held that the contract was unenforceable, citing Marcus v. Goodrich, supra. The opinion of the court states:

The evidence is clear that, in the community of Stowe, the plaintiff was known as a proficient practitioner of all of the architectural arts with respect to home building, at least. It was a business operation for which he received fees. He presented himself to the public as one who does the work of an architect. This constitutes holding oneself out as an architect, and is part of the very activity sought to be regulated through registration. It is forbidden to the unlicensed who do not fall within the permitted exceptions listed in the law, as this plaintiff does not. 26 V.S.A. §124.

128 Vt. at 148.

"The facts in the present action have a different bearing. No evidence was presented at the trial to indicate that MacMillan (sic) held itself out to I.V.O.W. (sic), or the public generally as performing architectural services. MacMillan's (sic) preparation of the plans, drawings and specifications for I.V.O.W. (sic) was work preparatory and incidental to the project which the plaintiff was led to believe it would be engaged to construct. There was no intention in either party for the plaintiff to submit the proposal as a professional architect.

"The various plans were characterized by Clarence Whitney and plaintiff's expert, J. William Hasskarl, as 'working drawings.' As such, the services rendered by the plaintiff were lawfully performed within the permitted exceptions referred to by



the court in Rodgers as 'working drawings, detail and shop drawings by persons other than architects for use in connection with the execution of their work. 26 V.S.A. §124."

[See Pages 11a & 11b]

\* \* \*

". . . The court concludes that the plaintiff's plans for the I.V.O.W. (sic) project were sufficiently original to achieve common law copyright protection.<sup>11</sup>/ As owner of those common law rights, MacMillan (sic) is entitled to the same protection of those rights as is accorded to other property rights until the common law copyright is lost through a general publication of the plans. See Schwartz v. Broadcast Music, Inc., 180 F. Supp. 322,328 (S.D.N.Y. 1959)."

[See Page 11c]

\* \* \*

"Applying these general principles of copyright law to the facts of the present case, the court is persuaded that any distribution of the plans for the shopping center addition made by the plaintiff was to a restricted group and for the limited purpose of advancing the construction project. The plans were developed by the plaintiff for the purpose of obtaining the contract to construct the addition. Before construction of the project could begin it was necessary for the defendant I.V.O.W. (sic) to disclose the proposed plans to prospective tenants of the shopping center addition in order to gain their approval. Similarly before the defendant's bank would agree to finance the construction, it was necessary to review the plans. The only distribution of its plans allowed by MacMillan (sic) to anyone, other than

Insert - Page 11

"The plaintiff's right to recover is principally founded on the claim of a common law copyright in the plans it prepared for the Manchester shopping center. It contends that any publication of the plans was a 'limited publication' which did not affect its copyright. From this position MacMillan urges that the defendant's improper use of the plaintiff's plans was an infringement of its copyright and constituted a conversion of the plans, resulting in the unjust enrichment of I.V.O.W. at the expense of MacMillan.

"These issues must be determined according to the law of Vermont. Since we find little Vermont authority on point, the law of other jurisdictions must be consulted in the attempt to forecast how the Vermont Supreme Court would apply the common law in dealing with the claim.<sup>10/</sup>

"Architectural plans containing some substantial originality of their author are protected by the common law copyright. Nucor Corp. v. Tennessee Forging Steel Service, Inc., 476 F.2d 386, 389-90 (8th Cir. 1973); Ketcham v. New York World's Fair 1939, Inc., 34 F. Supp. 657 (S.D.N.Y. 1940) aff'd 119 F.2d 422 (2d Cir. 1941) (Mem.); Smith v. Paul, 174 Cal. App. 2d 744, 345 F.2d 546, 77 A.L.R. 2d 1036, 1041 (1959); Nimmer, The Law of Copyright § 26 (1967); 5 Am. Jur. 2d. Architects § 10; Annot., 77 A.L.R. 2d 1048 (1961). The MacMillan plans consisted of six sheets of working drawings and thirteen pages of specifications which the plaintiff had produced in sufficient detail to accomplish the proposed



Insert - Page 11

construction of the addition to the shopping center. The plans embodied some original and creative solutions to the various design problems involved in the project. They were essentially the product of the independent efforts of the plaintiff's draftsman, McAnney."

Insert - Page 11

"The owner of a common law copyright has the right to be the first person to publish his work; upon publication the common law copyright is terminated. Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1833); National Comics Publications v. Fawcett Publications, 191 F.2d 594, 598 (2d Cir. 1951). To constitute a publication there must be a dissemination of the work to the public in such a way as to engender the belief that it was intended to make it common property. A limited publication of a work does not divest the holder of the common law copyright. American Tobacco Co. v. Werckmeister, 207 U.S. 284, 299-300 (1907). To avoid a destruction of a common law copyright, the publication 'must be restricted both as to persons and as to purpose, or it cannot be called a private or limited publication'. American Visuals Corp v. Holland, 239 F.2d 740, 744 (2d Cir. 1956) (quoting White v. Kimmell, 193 F.2d 744, 747 (9th Cir. 1952)."



I.V.O.W. (sic), was to this restricted group for the limited purpose of enabling the defendant to obtain needed approvals of the proposed structure."

[See Page 12a]

\* \* \*

" . . . The circumstances of MacMillan's (sic) delivery of its plans to I.V.O.W. (sic) do not justify the conclusion that the delivery was made with the intention of rendering the plans common property. Although MacMillan (sic) did not expressly limit I.V.O.W.'s (sic) use of the plans, the plans were delivered under conditions impliedly precluding their dedication to the public.12/ No loss of MacMillan's (sic) common law copyright in its plans for the addition to the shopping center was incurred by its delivery of several copies of the plans to the defendant for distributing to the financing institution and prospective tenants."

[See Page 12b]

\* \* \*

"When the plans prepared by the plaintiff (Plaintiff's Exhibit 7, 11) are compared with those prepared by Crandell Associates (Plaintiff's Exhibit 12), it is apparent that drawing A-2 of the Crandell plan is a virtual reproduction of drawing number 4 in the MacMillan (sic) plans. See note 9, supra. The similarities in the arrangement and substance of the two drawings compel the conclusion that Crandell drawing A-2 was copied. Moreover, the remaining Crandell drawings exhibit other similarities to the MacMillan (sic) plans in design and detail. To establish a copyright infringement 13/ it is not necessary that



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"The defendant has argued that there can be no limited publication in these circumstances since the plaintiff's delivery of the plans to I.V.O.W. was not accompanied by an express limitation as to their use. The prevailing law in this regard is that:

A limited publication is 'one which communicates a knowledge of its contents under conditions expressly or impliedly precluding its dedication to the public.' ... Further, to be general a publication must be such '... as to justify the belief that it took place with the intention of rendering ... (the) work common property.' ... While the test is properly one of intention, it is clear that the unexpressed, subjective intention of the creator cannot be allowed to govern ...; rather the implications of his outward actions to the reasonable outsider are controlling."

Nucor Corp. v. Tennessee Forging Steel Service, Inc., 476 F.2d at 390 n.7 (quoting Edgar H. Wood Associates, Inc. v. Skene, 347 Mass. 351, 197 N.E.2d 886, 892 (1964))."



Insert - Page 12

"I.V.O.W. was given the plans for the addition to the shopping center on the tacit understanding that they were to be used if MacMillan were awarded the construction contract. After MacMillan was rejected as the builder, William Szirbik excised the title blocks, indicating MacMillan's authorship, from the plans and gave them to Etbro Construction Company for its use in designing the project. In turn, Etbro Construction Company made the plans available to Crandell Associates, the architectural firm that prepared the final plans for the building from the MacMillan plans."



the whole or even a large part of the MacMillan (sic) plans were copied. It is sufficient if a material and substantial part were copied even though it constitutes only a small part of the entire package of drawings. Nucor Corp. v. Tennessee Forging Steel Service, Inc., 476 F. 2d 386, 291 (8th Cir. 1973); Nikanov v. Simon & Schuster, Inc., 246 F.2d 501,504 (2d Cir. 1957).

"Although the principals of I.V.O.W. (sic) did not personally copy the MacMillan (sic) drawings, the defendant is nonetheless liable for any infringement which may have occurred. . . ."

[See Page 13a]

\* \* \*

" . . . Consequently, anyone 'who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a 'contributory' infringer."<sup>14/</sup> Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159,1162 (2d Cir. 1971). See Kalem Co. v. Harper Brothers, 222 U.S. 55,63 (1911); 18 Am. Jur. 2d 'Copyright and Literary Property' §124 at 411."

[See Page 13b]

\* \* \*

"The facts that establish that I.V.O.W. (sic) infringed MacMillan's (sic) common law copyright also support liability on a conversion theory. The essence of an action of conversion in Vermont is that '[c]onversion consists in . . . appropriating property to one's own use and beneficial enjoyment, . . . exercising dominion over it to the exclusion of owner's rights . . . ' Redd Distributing Co. v. Bruckner, 128 Vt. 635, 639 (1970). See Restatement (Second) of Torts, §228 (1965); 1 F.



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"Since common law copyright infringement is wrongful, concepts of tort liability are relevant in fixing the scope of the remedy. The basic common law doctrine that one who knowingly participates in, or furthers a tortious act, is jointly and severally liable with the prime tortfeasor, is applicable to the present case. See Screen Gems-Columbia Music, Inc. v. Mark Fi Records, Inc., 256 F. Supp. 399, 403 (S.D.N.Y. 1966); W. Prosser, Law of Torts, § 46 at 291-92 (4th ed. 1971)."

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"I.V.O.W. could have had the addition to its shopping center designed and constructed without the use of the plaintiff's plans. Nonetheless, the defendant did allow Etbro Construction Company and Crandell Associates to use MacMillan's plans in preparing the final plans used in construction. The appropriation of the fruits of MacMillan's labor by the defendant, in order to facilitate the preparation of comparable plans without the expenditure of the time and effort required for independently arrived at results, is copyright infringement. Orgel v. Clark Boardman Co., 301 F.2d 119, 120 (2d Cir. 1962)."



Harper & F. James, The Law of Torts, §2.24 (1956).

"Under the circumstances of the delivery of the plans by Allan McAnney to I.V.O.W. (sic), the defendant was implicitly authorized to use MacMillan's (sic) plans only in connection with MacMillan's (sic) bid for the construction contract. After MacMillan (sic) was rejected as the builder, the defendant's appropriation of the plans to its own use exceeded that authorization. Accordingly, I.V.O.W. (sic) is subject to liability for conversion to the plaintiff, whose right to the exclusive use of the plans was violated.15/

"The plans were prepared at considerable expense to the plaintiff. By the misappropriation, MacMillan (sic) has sustained damage. Under the particular circumstances of this case, the most equitable measure of the plaintiff's damage is the reasonable value to I.V.O.W. (sic) of its use of the MacMillan (sic) plans. See Read v. Turner, 239 Cal. App. 2d 504, 48 Cal. Rptr. 919, 40 A.L.R. 3d 237, 245 (1966); 18 Am. Jur. 2d 'Copyright and Literary Property' §136 at 423-24.

"The testimony of Allan McAnney established that he spent a substantial portion of time during a six month period in preparing the final plans for I.V.O.W. (sic) Those plans, in their final form, would have been adequate to use in constructing the building. With the assistance of the MacMillan (sic) plans, I.V.O.W. (sic) was able to obtain a firm bid for the project from Etbro Construction Company within two weeks; a considerably longer period would have been necessary without the plans. Using the MacMillan (sic) plans, I.V.O.W. (sic) was able to obtain an Act 250 permit in



December of 1972 more expeditiously than it could have without the plans. With the aid of the MacMillan (sic) plans, Crandell Associates was able to design a similar structure with a minimum of independent effort and, presumably, at a minimal cost. Finally, the overall time savings made possible through the defendant's use of the plans enabled I.V.O.W. (sic) to have the project completed and generating income at an earlier point in time than would have been possible without the use of plaintiff's plans.

"Expert testimony established that it is the custom in the construction trade to include the costs of design work for a particular construction project in the final contract price. These design costs compose approximately 8% of the total contract cost. This the defendant well knew. The design work completed by Allan McAnney for MacMillan (sic) had a reasonable value of \$12,500.16/ Had the work been performed by an architectural firm, the cost to the defendant would have been substantially higher. The court considers that amount to represent a reasonable approximation of the overall value obtained by the defendant from its improper use of the MacMillan (sic) plans. In addition, interest will be assessed against the defendant from the date of the initial misappropriation of the plans, November 25, 1972, until April 2, 1974, at a rate of 7-1/2% and from April 3, 1974, to the date of a final order in this case at a rate of 8-1/2%."

[See Page 15a]

\* \* \*



Insert - Page 15

"Beyond its actual damage, the plaintiff asserted a claim for a punitive recovery. And exemplary damages are sometimes allowed in case of copyright infringement. See Press Publishing Co. v. Munroe, 73 F. 196 (2d Cir.), dismissed on other grounds, 164 U.S. 105 (1896). However, exemplary damages are not recoverable as a matter of right. The allowance of such an award is in the discretion of the trier of the fact where punishment is appropriate because of the malicious and wanton nature of the acts of which the defendant has been found guilty. See Parker v. Hoefer, 118 Vt. 1, 20 (1953). While the defendant's use of the plaintiff's work was deceptive, it was not done in malice, but rather as a wrongful means to gain a favorable contract price. The damages assessed against the defendant are substantial and will adequately compensate the plaintiff without imposing a punitive award as an example to others. See Read v. Turner, 40 A.L.R. 3d at 246."

#### FOOTNOTES

- 1/ MacMillan Company is registered to do business in Vermont as a foreign corporation. None of its employees are architects, registered and certified by the State of Vermont as provided in 26 V.S.A. §320 et seq.
- 2/ The defendant contends that it never requested the plaintiff to prepare any plans for the proposed addition. Although it is possible that no explicit request was made at the initial meeting of the Szirbiks and McAnney, nonetheless McAnney's impression that a proposed plan was being sought was continually reinforced by William Szirbik's subsequent dealings with McAnney; and was confirmed in writing by Szirbik in his memo to McAnney, dated October 30, 1972 (Plaintiff's Exhibit 4).
- 3/ It is the custom of the construction industry to include the costs of preliminary design work for a contract as an element in the final construction price. Expert testimony fixed these preliminary design costs at from 8 to 9 1/2% of the total contract price. Had MacMillan been successful in obtaining the I.V.O.W. contract, design costs would have been recouped in this customary fashion. The purpose of the commitment letter was to insure MacMillan some compensation in the event that it was not awarded the contract.
- 4/ One copy was also given to the surveyor, Dauchy, so that he could prepare a plot plan of the shopping center with the proposed addition sketched in. Dauchy testified that he would have been unable to prepare such a plan without MacMillan's plans.
- 5/ Gene Mellish, a registered engineer in the State of New Hampshire, assisted McAnney in resolving certain of the technical questions that the project raised.
- 6/ Clarence Whitney, the architect at Crandell Associates who was responsible for the plans actually used in the construction of the addition, indicated that for his purposes the MacMillan plans were not sufficiently detailed to use in constructing the building that he had designed. He admitted, however, that they might be adequate for a structural steel contractor, such as MacMillan, to use in constructing a pre-engineered building.



- 7/ Implicit in this finding is the fact that the court places little credence in the testimony of William Szirbik that the MacMillan plans were simply enlargements of his sketches and concepts which he had earlier provided to the plaintiff. The sketches and elevation views, claimed by William Szirbik to be reproductions of materials provided to the plaintiff during the autumn of 1972, appear to the court to have been traced either from the plaintiff's drawings, or from the final Crandell drawings (which themselves appear to have been partially traced from the plaintiff's drawings).

[See Page 17a]

\* \* \*

- 9/ The fact that drawing number two of Crandell's plans Plaintiff's Exhibit 34) overlays precisely drawing number four of the MacMillan plans leads the court to the conclusion that that particular Crandell drawing was drafted directly from the MacMillan plans.

[See Page 17b]

\* \* \*

- 12/ A distribution of plans to potential contractors and subcontractors for bidding purposes does not constitute a general publication. See Read v. Turner, 239 Cal. App.2d 504, 40 A.L.R. 3d 237, 244-45 (1966). This is true even though the plans are not marked confidential, are not required to be returned, and can be obtained without paying a deposit. See Nucor Corp. v. Tennessee Forging Steel Service, supra at 390; Pressed Steel Car Co. v. Standard Steel Car Co., 210 Pa. 464, 60 A. 4 (1904).

- 13/ We are of the view that were the Supreme Court of Vermont to articulate the necessary elements to establish an infringement of an unpublished material, protected by a common law copyright, it would conclude that they are essentially the same as would be required to show infringement of published material, protected by statutory copyright. See Smith v. Little, Brown & Co., 245 F. Supp. 451, 457 (S.D.N.Y.) aff'd 360 F.2d 928 (2nd Cir. 1966).

- 14/ While I.V.O.W. can be held liable in tort under this reasoning, the infringing conduct of Crandell or Etbro Construction Co. would not incur liability on their part if they were ignorant of their unauthorized use of the MacMillan plans. See 1 F. Harper & F. James, The Law of Torts, §2.24 at 163 (1956).

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- 8/ MacMillan's request of I.V.O.W. for return of its plans, specifications and contract explicitly referred only to those documents delivered by McAnney on November 24, 1972, as part of MacMillan's final proposal. On returning those documents, Szirbik still retained a number of MacMillan's earlier working drawings which were substantially the same as the plans returned.



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10/ 17 U.S.C. §2 specifically permits the retention of common law copyright by the owner of an unpublished work. This statute permits the states to retain jurisdiction to hear cases dealing with infringements of common law copyrights and to regulate such infringements through their own laws. Press Publishing Co. v. Monroe, 73 F. 196 (1st Cir. 1896); International Tape Manufacturer's Ass'n v. Gerstein, 344 F. Supp. 38, 56 (S.D. Fla. 1972). See Smith v. Little, Brown & Co., 360 F.2d 928, 930 (2d Cir. 1966); Porter v. United States, 473 F.2d 1329, 1337 (5th Cir. 1973).

11/ In reaching this conclusion we reject the argument advanced by I.V.O.W. that the plans were actually authored by William Szirbik and merely enlarged and refined by Allan McAnney at his drawing board, as being unsupported by the credible evidence.

- 15/ Compare Vermont Acceptance Corp. v. Wiltshire, 130 Vt. 219 (1931). In the Wiltshire case the defendant purchased an automobile, signing a conditional sales agreement with the plaintiff which provided that the car was not to be used in any unlawful pursuit. Subsequently, the defendant was apprehended for illegally transporting liquor in the car. This unauthorized use of the car was found by the court to constitute a conversion.
- 16/ The practice of the MacMillin Company was to include in their construction fee a figure for preparation costs which would not exceed 8% of the contract amount. (Plaintiff's Exhibit #3).



JUDGMENT

"It is Ordered and Adjudged that judgment is hereby entered in accordance with the Findings of Fact and Conclusions of Law (filed June 24, 1976), for plaintiff, the MacMillin Company Inc., to recover from defendants, I.V.O.W. Corporation and William Szirbik, the sum of Twelve Thousand Five Hundred Dollars (12,500.), plus interest from November 25, 1972 to April 2, 1974 at the rate of 7 1/2% per annum, being One Thousand Two Hundred and Sixty-Six Dollars and twenty-two cents (1,266.22); and interest from April 3, 1974 to September 16, 1976 at the rate of 8 1/2% per annum, Being Two Thousand Six Hundred and Eight Dollars and seventeen cents (2,608.17); making a total amount of Sixteen Thousand Three Hundred and Seventy-Four Dollars and thirty-nine cents (16,374.39), together with interest from September 16, 1976, at the rate of 2.9109 per day until paid; together with plaintiff's costs."

RELEVANT PORTIONS OF TRANSCRIPT

McCANNY-DIRECT-ROSI [40]

\* \* \*

Q. After the letter of August 11th and the submission of the sketches enclosed therein, when was the next meeting with I.V.O.W. and for what purpose was that meeting?

A. Well, our company policy was to do preliminary work for anyone who requested it, which would constitute preliminary lay-out type drawings. And establish a preliminary price, a ball park figure or a fairly [41] accurate figure. From that point on unless the owner was willing to commit to reimbursing the MacMillin Company for a cost that might be incurred in producing working drawings, we did not proceed beyond that point without some sort of a letter, which I generally dictated and was written to the prospective owner. I had explained that this was coming and I think the meeting that you are talking about was my delivery of the preliminary material, to the Szirbiks along with price and also a letter that I would request that they sign, committing to our cost should we proceed any further than that.

Q. Now, you explained this policy to the Szirbiks?

A. Yes, sir.



Q. I show you a document marked Plaintiff's Exhibit #3 and admitted, could you identify that please?

A. This is the letter that I dictated to the, to Mr. Szirbik, indicating the size and approximate price that we expected the building to cost, explaining that what their commitment would be if they were to authorize us to proceed.

Q. You indicated that there was a meeting that you attended, when was that meeting?

A. I would say it's in September, toward the end of August, first of September.

Q. Did you show this letter to the Szirbiks?

A. I did but it didn't mean very much. I should explain [42] that it was a very difficult thing to determine just what the size of this building was going to be. We kept getting requests from the supermarket and there were other tenants involved and it was very hard to determine how big the building was going to be, so that this letter tied down the square footage as we knew it to exist, approximately twenty thousand feet and it tied a price per square foot. That is how we established the over-all estimated price. Because we agreed in this letter that their commitment would be void if indeed we weren't able to live within that figure; then, a letter had to correspond exactly with the square

footage that we were dealing with and at that meeting the square footage was changed.

Q. What was the square footage changed to, do you recall?

A. I believe it was increased by, I don't recall the exact footage.

Q. In any case you did not turn this letter over to the Szirbiks?

A. No, I believe at that time I was fairly convinced that we had a very nice relationship. I enjoyed working with them; they were very open with me and I was convinced that we were going to build a building. I wasn't too concerned, I was mildly concerned because I didn't have any protection for the company but it appeared in all of our conversations that my apprehension was unfounded because it became apparent that we [43] obviously were going to build this building and they were very anxious to get it started and so forth.

\* \* \*

Q. Following the meeting at which this letter was not delivered, what was the next thing that happened?

A. Well, winter was fast approaching and we, the Szirbiks were very anxious to find out what their costs was going to be and I think we stepped right in to the stage of preparing working drawings. I returned [44] to the office and started aiming



in that direction and revising the plans to reflect the additional square footage that had been added and so forth.

Q. Were there occasional requests from the defendant for examples of your progress?

A. Yes, they had tenants, were interested in the configuration of their areas and there was requests for plans that the tenants apparently or the bankers could use in interior lay outs and what have you, but there were repeated requests for drawings, yes.

Q. I show you a document marked Plaintiff's Exhibit #4 and admitted, would you tell the Court what that document is?

A. That is our request from the I.V.O.W. Corporation for six more copies of the drawings that we had that we were in the progress of preparing.

Q. What is the date on that letter?

A. October 30th.

Q. What year.

A. 1972.

Q. Thank you. Were final working drawings completed?

A. Yes. Final working drawings were completed and a final proposal was prepared. Say approximately the end of October or the first part of November.

Q. I show you Plaintiff's Exhibit #7 and could you tell the Court what Plaintiff's Exhibit #7 is?

A. They are the working drawings prepared by me.

\* \* \*

McANNEY-DIRECT-ROSI [80]

Q. Does MacMillin Company keep detailed time records of work spent on particular jobs?

A. Unfortunately not.

Q. Does it keep detailed travel records of travel expenses on individual jobs?

A. Unfortunately not.

Q. Does it keep detailed telephone records, or any accounting record with regard to any particular job?

A. Not at that point, they are now.

\* \* \*

McANNEY-CROSS-STERMBERG [84]

Q. Well, I believe you were asked in an oral deposition, how much of the work that you perform was architectural and you responded, do you recall?

A. I don't recall how I responded, no. The work is similar. I can't give you any specific differences.

Q. I draw your attention to the oral deposition that you gave on January 18th 1974, and I ask you if this is your signature?

A. Yes, it is.

Q. And you read this entire document, this entire deposition before signing it?

A. Right.



Q. You were asked a question there, what portion of the time that went into the preparing of all this stuff, representing work that an architect would normally do, and would you recall and read this response for us.

A. 95%, 5% being the estimate.

\* \* \*

Q. [96] Thank you. Isn't it a fact that you don't know how many hours that you worked on the I.V.O.W. project?

A. That's correct.

Q. And isn't it a fact that you never kept a record of how many hours you worked on the project?

A. We never kept any records, that's correct.

Q. And, out side of yourself, the only two people who worked on this project were a Mr. Mellish and Mr. Bushway?

A. It's pretty much correct.

Q. And, it's correct to say that Mr. Mellish spent approximately one day on this project?

A. I believe he spent more than that.

Q. Again, I'm calling your attention to the deposition that you gave in January of 1974 and you were asked the question, "how much time would you say he spent" and we were talking here about Eugene Mellish.

A. Yes.

Q. And, would you read your response?

A. (doing so) "I guess I would have to say a day or so."

Q. Thank you. That's page 26. I'm sorry, Page 25, line 16.

And, Mr. Bushway spent approximately two hours on this project, did he not?

A. Quite possibly.

Q. Now, on occasion in traveling to meet I.V.O.W., you stopped at other projects, isn't that correct?

A. That is correct.

Q. [97] And, you prepared preliminary plans for another individual who wanted to build for Ben Franklin in Manchester roughly at the same time, isn't that correct?

A. It was prior to this.

Q. Shortly prior thereto, isn't that so?

A. It was not that far in front of it, correct.

\* \* \*

Q. [110] It is your testimony is it not, that if your bid had been [111] accepted, your proposal, that they wouldn't pay for anything in terms of preliminary work that you did?

A. Our out-of-pocket costs would have been included in our billing fee.

Q. If your bid had been accepted?

A. That's correct.

Q. And, it's your position that regardless of whether your bid is accepted, you should be paid for the design work?

A. No, that's not our contention.



Q. It is your contention that you expected at one point, to be paid for the work that you did if your bid were not accepted?

A. That's correct.

Q. And, we're talking about now, your conveying of your thoughts in a letter, which was never signed? In other words, you conveyed your thoughts to committing I.V.O.W. for preliminary work before, in case your bid was not accepted. Let me see if I can re-phrase that. You did express your intention in a letter that you allegedly prepared, committing I.V.O.W. to pay for costs in the event the bid was not accepted?

A. I did.

Q. And, that letter was never signed?

A. It was never signed.

\* \* \*

Q. [122] So, again you knew that your drawings were being shown to others based upon this letter that you acknowledged reading?

A. Yes, we knew that the preliminary layouts were being shown, yes.

Q. And, you responded to this letter by submitting additional copies did you not?

A. Yes. Could I expound on that?

Q. I'd rather not unless the Judge wants to hear it.

THE COURT: We will allow you to finish.

A. The plans that are referred to there are not the complete set of plans as was shown over here in this exhibit, they may be just a floor plan.

Q. And, did you place any restrictions on the plans, any written restrictions?

A. No.

Q. So you never told them not to show them to any tenants or to a bank or anything like that?

A. I never told them not to do that.

\* \* \*

McANNEY-REDIRECT-ROSI [126]

Q. Now, a great deal of attention was addressed to the letter of August 31, Plaintiff's Exhibit #3, which from your direct testimony, was never delivered, physically delivered to the I.V.O.W. Corporation. Could you tell [127] the Court how that letter was prepared and why?

A. Our Company's procedure was to do for anyone, preliminary plans and preliminary estimates and no charge. Again, as the means to get a project, there were certain layouts involved and certain estimating procedures followed and it was not intended as a guaranteed, maximum price or anything of the kind, it was intended to give the owner some close idea as to where the project was going in terms of money and what it might look like. This letter was again,



standard procedure and it was intended as a vehicle to get from one stage, which was preliminary, to the second stage which was final working drawings. And the amounts mentioned are, -- was an effort to find out, by the MacMillin Company, just how committed the owner was to being serious about his project.

Q. Would you explain what you mean by that.

A. Well, the, in this case there was reference to a \$2500.00 fee. The fee wasn't related to any service or any dollar amount other than the fact that it was supposed to be little enough money so that the owner would not be spirited away or frightened by it, but enough money so that he would express his commitment to the MacMillin Company. And it was an arbitrary figure.

\* \* \*

Q. [128] Now, did you tell the Szirbiks about this letter?

A. Yes, of course.

Q. Did you relate to the Szirbiks, the content of the letter?

A. Yes, I did?

Q. And, when did you do that?

A. I can't tell you exactly, but I'm sure the day that I had that letter in my possession with the intention of having them sign it. I told them that I had it, I explained what it said and the reason for it, it was no surprise, that it was explained that that's

the procedure of the Company and they should expect to have it coming down.

Q. Did you have the letter in the open?

A. Oh yes.

Q. In your meeting.

A. Sure.



Q. Did you ever hand it to them?

A. I can't recall if I did or not, to be honest with you.

Q. In any case, you did relate to them the content of it?

A. Yes.

\* \* \*

Q. [132] Do you know how the two sets of plans, that you gave to I.V.O.W. turned into three sets of plans?

A. I took enough sets of plans to them, that it's possible they had a number of sets.

Q. Approximately how many sets, to the best of your recollection, of the drawings typified as Plaintiff's Exhibit #7, did you give to I.V.O.W.?

A. Complete sets like those?

Q. Yes.

A. I have no idea. I wasn't aware that we gave them more than two, to be honest, but apparently we did, possibly three or four I don't know. I know it's my habit to take with me plans, when I went over there.

\* \* \*

ETTORI-DIRECT-ROSI [162]

Q. All right, after the meeting with Mr. McAnney, what was the next thing that happened?

A. The various difficulties on the job worked out and construction started. I take that back, the plans that we had, although, because I'm involved in the

everyday hammer and nail deal as well, and by estimating the job and doing my own take-offs, the plans were not as complete that I could give them to my sub-contractors to deal with and things like that. So we went out and we had the plans drawn over. We had the designs checked. It was not a pre-engineered building, it went to more of a conventional structure. There were a lot of changes that had to be made, documentations so that you could give to the various other sub-contractors on the trade to perform their work. There wasn't sufficient data on those drawings.

\* \* \*

- Q. [173] So, it was after the project was completed that you went to Clarence Whitney and picked up these drawings?
- A. Right, I had no need for these drawings, they were not what I was building by and as far as I was concerned, they were of no use to me. I did not use these drawings.
- Q. When was the project completed?
- A. I think around September.
- Q. Of what year?
- A. 1973.
- Q. Did you pay Crandell Associates for the work that they performed?
- A. Right.
- Q. How much did you pay Crandell?



A. There is, the initial bill was involved at approximately \$1,800.00

And, there was a final bill?

A. There were some charges, due to changes of, -- I have certain methods, certain standards and practices that I use in my type of construction and there are various things on these plans that I did not agree with the Architect on and therefore, we went back to him and we had changes made. Plus the food store, P and C gave us details that they wanted incorporated in their sub-floor of the grocery store and an additional \$1,600.00 on top of that. So, the bill was \$3,400.00 to \$3,600.00.

\* \* \*

Q. Now, you stated yesterday that a contract for \$155,000.00 some dollars was signed between yourself and I.V.O.W.?

A. Right.

Q. Were you ultimately the contractor on this job?

A. I was, you'd probably classify me on this particular job as a sub-contractor because there was a bond and a general contractor for bank purposes.

\* \* \*

Q. [175] I see. Having reviewed the MacMillin drawing, or at least the drawings that were given to you the last Saturday in November, do you have any opinion, based upon your experience, as to the amount of work

that went into the preparation of the initial drawings?

A. The actual drafting time where you give instructions to an individual who sits at a drafting board and this is his profession, he doesn't necessarily have to be an Architect. If you give him a day for each plan, the guy has done this type of detailing before and he should be rather fast if he is an experienced draftsman. I don't know how many changes and what discussions took place but maybe a week's time as far as on the board type work.

Q. How much other work would you, in your judgment, consider is necessary in preparing the drawings?

A. There is the sales effort, the sales calls. If a budget price was put together, there had to be a lot of estimating work involved in putting the price together. [176] The steel outfit that is referenced on here would have to be contacted and things worked out with them.

Q. Do you have any opinion based upon your experience as to the relative dollar amount of that kind of work?

MR. STERNBERG: Your Honor, he's asking the witness to speculate.

THE COURT: We will allow the question.

A. I was able to put mine together in two weeks time, only because I did everything myself. If



you delegate your authority, it's going to take much longer and there's that much more discussion involved between the associates that are putting the price together. Maybe they spent a month.

Q. Well, let's back up on your testimony a minute. You indicated that if someone gave the instructions to a draftsman, the drafts would take a week or so?

A. Right.

Q. How much time, in your opinion, based upon your experience, would be involved in the preparation of the initial instructions to the draftsman?

A. It depends on how the salesman operates and in the corporate policy on how much this guy needs. If the guy, the individual who is actually doing the drafting of the project, okay. If he is new with the firm and hasn't worked there that long, it's going to take longer and it's going to take additional instructions. Or you can tell an experienced draftsman that's been [177] with an Architect or worked with the firm before, that we want a one-hour-rated fire wall here and we're going to use pre-engineered system and we want wood shingles on the roof and give the guy some leniency okay. There's less time involved with more experienced people. I don't know what the MacMillan Firm is like in the people they employ so

it's hard for me to say. I have used moonlighter drafting services on the side by people that, by one particular individual that is lacking three credits for his Architect's examined qualification, and he charges me \$7.50 an hour.

Q. Are you referring now to the drafting work?

A. The drafting work.

Q. I am asking specifically with regard to the work prior to drafting, essentially in the formulation of what was to be drafted.

A. This is sales time. The salesman could and I'm supposing here, made sketches of some nature and called out. Maybe the firm has done similar jobs and they just took an existing documentation out of the file and marked it up and said, change this and this and use this section that we used on other jobs. Take a bunch of blue prints and cut them up. I can't answer for the sales time involved.

\* \* \*

ETTORI-CROSS-BANSE [201]

Q. Now, if the Szirbiks had in the course of their discussion [202] with you, asked you to come up with some drawings like this. How would you have gone, by this I mean Plaintiff's Exhibit 7, how would you have gone about it?



A. I do not have the organization that MacMillin does, so I use outside people. Normally they're working with some other firm, that are employed by them hourly that are looking to pick up some extra money on the side. In my case, I would have gone to an individual that I have used before and respect and say "look this is what I need, draw these up for me will you?" And he would charge me on an hourly basis and when I picked up the drawings, I would have to pay him.

Q. And based on your experience, what would that hourly charge have been?

A. The hourly charge with him is \$7.50.

\* \* \*

ETTORI-RECROSS-BANSE [210]

Q. Just to briefly reiterate, Mr. Ettori, you estimated that it would cost you about \$1,000 to obtain the plans to which we have been referring, is that correct?

A. Correct.

Q. And, you also testified that it wouldn't be unusual for a contractor such as you, to invest \$1,000 in sales effort without reimbursement?

A. Correct.

Q. And, you also testified, strike that. I also understand you correctly, that some of the effort that went into these plans, you did anyway in preparing your estimate?

A. Correct.

Q. So, the plans weren't worth \$1,000 to you were they?

A. No.

Q. And, you also testified that an architect was needed on this project, is that correct?

A. Correct.

Q. And, you paid the architect?

A. Yes, I did.

Q. And, you paid him out of the, your contract price?

A. Right.

Q. And, you paid the architect \$3,500.00 is that your testimony?

A. Right.

\* \* \*

ETTORI-REDIRECT-ROSI [213]

THE COURT: I understood you to say, Mr. Ettori, that you wouldn't engage in preparing such elaborate plans unless you had the contract, or unless you were paid for it?

A. That's correct.

THE COURT: How do you arrive at the amount that you'll be paid, in the event that you make a demand from the owner, that before you go into this sort of detail, that you want compensation?

A. There is no way that you're going to get the full value out of the owner for those, for any plans that



you generate. If you go ahead and say, well I want say \$5,000 to do the plans on your building, he's going to laugh at you and say, I can get somebody else to do them for nothing. So, you try to at least get some compensation that would be a good faith on the part of both parties, to off-set some of your costs. No matter what type of operation you run, you have a cost of sales that is figured into your price. The only thing you're trying to do is to off-set some of [214] that by asking for a deposit or a binder or some type of monetary reimbursement. And in many cases that fee is applied to the cost of construction and they are given a credit later on, upon signing contracts.

\* \* \*

HASSKARL-DIRECT-ROSI [246]

Q. Upon reviewing the specifications, the drawings, Plaintiff's Exhibit 7, and the estimate book, as an expert do you have an opinion as to the reasonable value of the work incorporated within those documents?

A. Yes, it would be definitely in the range of ten to twelve thousand dollars.

\* \* \*

HASSKARL-CROSS-BANSE [250]

Q. What percentage did you use?

A. A job of this complexity would normally, and this particular size would normally carry a percentage of about nine and a half percent of the construction costs and applying that against the work at this stage, you would use 75 percent of that figure because the remaining 75 percent would be for the supervision of construction.

Q. Are you saying this is the way an architect would normally charge for a job of this nature?

A. Yes.

Q. Normally charge around nine and a half percent of the contract price?

A. Right.

\* \* \*

Q. Now, if I understood your testimony correctly, nine and a half percent you call an architect's fee?

A. Yes.

Q. That would encompass the entire scope of the normal architect's work on a project, is that right?

A. Yes.

\* \* \*

HASSKARL-REDIRECT-ROSI [276]

THE COURT: You have referred somewhat to employment of draftsmen, do you have any judgment as to the value of these particular drawings that compose Plaintiff's 7, from the standpoint of work



having been performed by a draftsman as distinguished from an architect? [277]

A. Which set of drawings are you referring to Judge?

THE COURT: Plaintiff's 7, is the completed plans that were submitted by MacMillin.

A. Well, if I understand your question correctly, even assuming you have a so-called draftsman executing the plans, he has to have supervision so does an architect and an engineer, or some professional that has an input in and above him. However, in the total scheme of things, a set of drawings like that, if your talking about draftsmen costs, which to me would be your out-of-pocket expense in producing those within an office. I would guess that your actual out-of-pocket expense would probably be in the neighborhood of four to five thousand dollars. Which in the normal course of events, you would have to have a profit of overhead and other considerations for the organizations as a totality.

THE COURT: Thank you, I think that's all.

MR. ROSI: If I might follow with one question, Your Honor.

Q. Mr. Hasskarl, you've indicated that there is a necessity to add some overhead factor, is there any factor with which you are familiar with in the profession?

A. Yes, the customary factor in the practice of

architecture is approximately two and a half times the out-of-pocket expense.

THE COURT: You mean that if you employed a [278] draftsman and he did all the work on these plans and these expenses to the architect was \$5,000 you would add two times that?

A. Two and a half.

THE COURT: For overhead?

A. And profit. In other words, you have to maintain an office, you have secretaries, you have light bills, you have phones, printing costs, professional insurance, just like a lawyer or a doctor does. It just keeps adding up and up.

THE COURT: That's all, thank you.

MR. BANSE: Mr. Hasskarl, when you set forth \$5,000 out-of-pocket cost, do you have a number of hours or man days figure in mind?

A. Yes, because we take around, it would be about eight to ten weeks involved in a set of drawings like that.

MR. BANSE: Man weeks?

A. Yes sir.

MR. BANSE: And, do you have an hourly rate that you are using?

A. I was trying to use something in the order of ten dollars an hour.



MR. BANSE: When you say "man week", are you talking about 40 hours?

A. Yes sir.

MR. BANSE: So, you're saying that 324 hours to draw those plans?

A. [279] Yes.

MR. BANSE: I'm talking about just drafting and drawing.

A. Yes.

MR. BANSE: Six sheets of plans?

A. You're paying on a 40 hour basis, you're lucky to get 30 hours of work out of a man.

MR. BANSE: You're talking about a salaried employee?

A. Yes.

\* \* \*

COTTON-DIRECT-ROSI [283]

Q. Do you, as a principal of I.V.O.W. -- I beg your pardon, as a principal of the plaintiff, MacMillin Company, disagree with the opinions stated by Mr. Hasskarl with the value of the product?

A. It's my own personal opinion that the value of the product is approximately \$10,000.

\* \* \*

COTTON-CROSS-BANSE [293]

Q. Now, you say that, you said in your direct testimony

that this concept of the, -- it's called a cut off mansard front?

A. Right.

Q. That was developed by MacMillin Company?

A. It was developed by Gene Mellish and Allan McAnney, [294] together, yes.

Q. Who is Gene Mellish?

A. Gene Mellish is an employee for MacMillin Company, who worked on this project with Alan.

Q. What is his position for the company?

A. He is a structural engineer.

Q. He's a structural engineer?

A. Yes, he is.

Q. And, where is he today?

A. He is working.

Q. And, how do you know he worked with Alan McAnney on this?

A. Because I saw him doing it.

Q. You saw him doing it.

A. I saw them confer, I saw him work on it.

Q. How do you know that it was his idea? Do you know that for a fact?

A. It was a combination of Mr. McAnney and Mr. Mellish's idea.

Q. Do you know that for a fact?

A. Yes, I do. I saw it developed.

Q. Your certain it couldn't have come from anybody else?



A. Absolutely, yes.

Q. Have you seen mansard roofs before?

A. Yes, many.

Q. Many? And, can you describe once again, how this differs [295] from the ordinary Mansard roof?

A. Well, there were many configurations of Mansards, some are very steeply pitched, some are not. Some do not have a large overhang, some don't. I think that's the best description I can give you. It is different than anything I've ever seen before.

Q. In what respect?

A. In his configuration, in size, in it's mass and in it's use. I had never seen a Mansard used to give the illusion of a large pitched roof. And that was the reason for this.

\* \* \*

WHITNEY-DIRECT-BANSE [304-A]

Q. Did you hear Mr. Hasskarl testify that the standard architect's fee for designing this particular project in Vermont, would be nine and half percent?

A. Yes, I did.

Q. As an architect, do you agree with that testimony?

A. I'd like to agree with it, but the fact of the matter is that it would probably be somewhat less than that, in Vermont, around Rutland area anyway. I would say it would be, if one were fortunate enough, they might demand an eight percent fee for this job, for the complete package.

Q. Now, Mr. Whitney, as the Rutland Associate of Crandell Associates, do you have general supervisions of, -- strike that. Can you describe your normal work in the Rutland Office?

A. Well, I'm in charge of all phases of work, through the Rutland office, from job development obtaining commissions, client relationships, the actual design of the building, of the project, the execution of the working drawings and observation of construction phases. Whatever particular phase of the job your contract will call for, I'm ultimately responsible for that.



Q. That covers every contract that was handled by the Rutland office?

A. Yes.

\* \* \*

Q. [307] Mr. Whitney, I show you again, documents that you obtained from Mr. Ettori, Plaintiff's Exhibit 11, and ask if you have any opinion as to what it would have cost your office to have these drawn?

A. Well, there are 1, 2, 3, 4 drawings here. I think there is another page, or part of a page. I estimate that for my office to do that set of drawings, there would take approximately eight to ten man days. Which is in hours that's up to 80 hours.

Q. And how would that translate into dollars and cents?

A. Well, I think probably that would be in the neighborhood of 14 or \$1,500.00.

\* \* \*

Q. [310] Do you have an estimate of the usual and customary compensation for an architectural draftsman in Vermont?

A. I think probably at that time you could hire a draftsman in this area. A good draftsman from between four to five dollars an hour.

Q. Do you have architectural draftsman in your employ?

A. At present, here in Vermont, I don't have a full time draftsman.

Q. Did you at this time?

A. Yes.

Q. And, what were you paying him?

A. I think I was paying him around \$4.75 an hour.

Q. Do you have any opinion as to the reasonable value of Plaintiff's Exhibit 11?

A. That's very difficult for me to answer, because for me to answer that, I would have to know what contractual relationship existed between the individual or who produced the drawings and what the, -- and the owner. There is a number of different ways to arrive at the compensation that one gets in the practice of architecture, especially in Vermont. And not having that knowledge, I really couldn't put a value on that. The best I could do, would be to estimate how much [311] time it would cost to take myself to do it and put a value on it that way. I don't know as that's applicable in this case.

THE COURT: We understand that you have testified to that already.

A. Yes. Well, I testified to Plaintiff's 11, is it? The one on the top. Yes.

Q. And, did you hear Mr. Hasskarl's testimony that, -- have you examined, ever seen Plaintiff's 7 before? Just take it a second and look through it.



A. Well it, at first glance they look the same, no they don't. Some of the drawings look to be the same ones that I remember in that set, these are not the same drawings, precisely. And these have a title block on them, those don't, the ones that I have seen, prior to this project had no title block.

Q. Did you hear Mr. Hasskarl's testimony to the effect that in his opinion, Plaintiff's 7 could have taken \$400.00 to prepare?

A. I have heard him testify to that.

Q. Looking, examining Plaintiff's 7, do you agree with that testimony?

A. I would say, it couldn't possibly take that much time for an architectural draftsman to do that work. Someone who is familiar with the construction trade, or the workings of producing architectural working drawings.

Q. [312] Do you have any opinion as to what would be a more accurate estimation?

A. I would say at the outside for that set of drawings, with the information that is on them, if you put in three or four man days, tops for anyone of those drawings and some of them, less.

Q. So, three or four man days tops for any one total of six drawings?

A. Yes.

Q. 16 to 24 man days tops?

A. Yes.





August 31, 1972

I.V.O.W. Corp.  
P. O. Box 662  
Manchester, Vt.

BEST COPY AVAILABLE

Att: Mr. William Szirbik

Dear Sir:

As discussed at our last meeting, we are prepared to develop drawings and specifications for your proposed addition to the Manchester Shopping Center in Manchester, Vermont.

Our understanding of the project scope is an addition to the present shopping center of approximately 20,000 sq. ft. which would include a Ben Franklin Store of 10,000 + an addition to the Super Duper Store of 5,000 + sq. ft. with the remaining area to be shell for future development. A square foot price of \$14.00 was established as a budget figure for the work outlined above, giving the project a total anticipated cost of approximately \$280,000.00.

Your signature below will authorize us to begin preparing the above-mentioned documents, and upon your approval, we will submit a guaranteed maximum price for the project. It is also agreed that should the project be abandoned or if The MacMillin Company is not the eventual contractor, IVOW Corp. will reimburse The MacMillin Company for out-of-pocket cost incurred not to exceed \$2,500.00. Because a budget of \$14.00 sq. ft. was established with our assistance, The MacMillin Company shall be bound to submit a price of \$14.00/sq. ft. or under for the work as now envisioned. Our failure to do so shall void your obligation of reimbursement. However, should the scope of work change and increase costs, your obligation for our preparation costs shall be valid.

If the project proceeds and The MacMillin Company, Inc. is indeed the general contractor, our preparation costs shall be considered included in our construction fee, which will not exceed 8% of the contract amount.



- 44 -

I.V.O.W. Corp.

- 2 -

August 31, 1972

Please sign and return one copy as authorization to proceed as outlined above and retain the other copy for your files.

Yours very truly,

THE MACMILLIN COMPANY, INC.  
INLAND-RYERSON DIVISION

Allan H. McAnney, Vice President

AHM/m

ACCEPTED:

BY \_\_\_\_\_

DATE \_\_\_\_\_



POST-kwik



IVOW CORPORATION

P. O. BOX 662  
MANCHESTER, VERMONT 05254

MESSAGE DATE 10/30/72

REPLY DATE

Mr. Allan H. McAnney  
The MacMillin Company, Inc.  
17 Elm Street  
Keene, N.H. 03431

Dear Allan:

We received the copies of the plans showing column layout etc. and have submitted them to the tenants for them to approve and layout their interior design. Between the tenants and the bank we do not have copies enough to satisfy everybody. Would you please send us six more copies mainly because Ben Franklin wanted four of the ones you sent us the first time.:::: I hope you are progressing with the plans and proposal with which you can undertake the initial construction phase.::::Just as soon as you possibly can, get the proposal to us so we can act and get approval.

Sincerely yours,

*W.L. Szirbik*  
W.L. Szirbik, Treas.

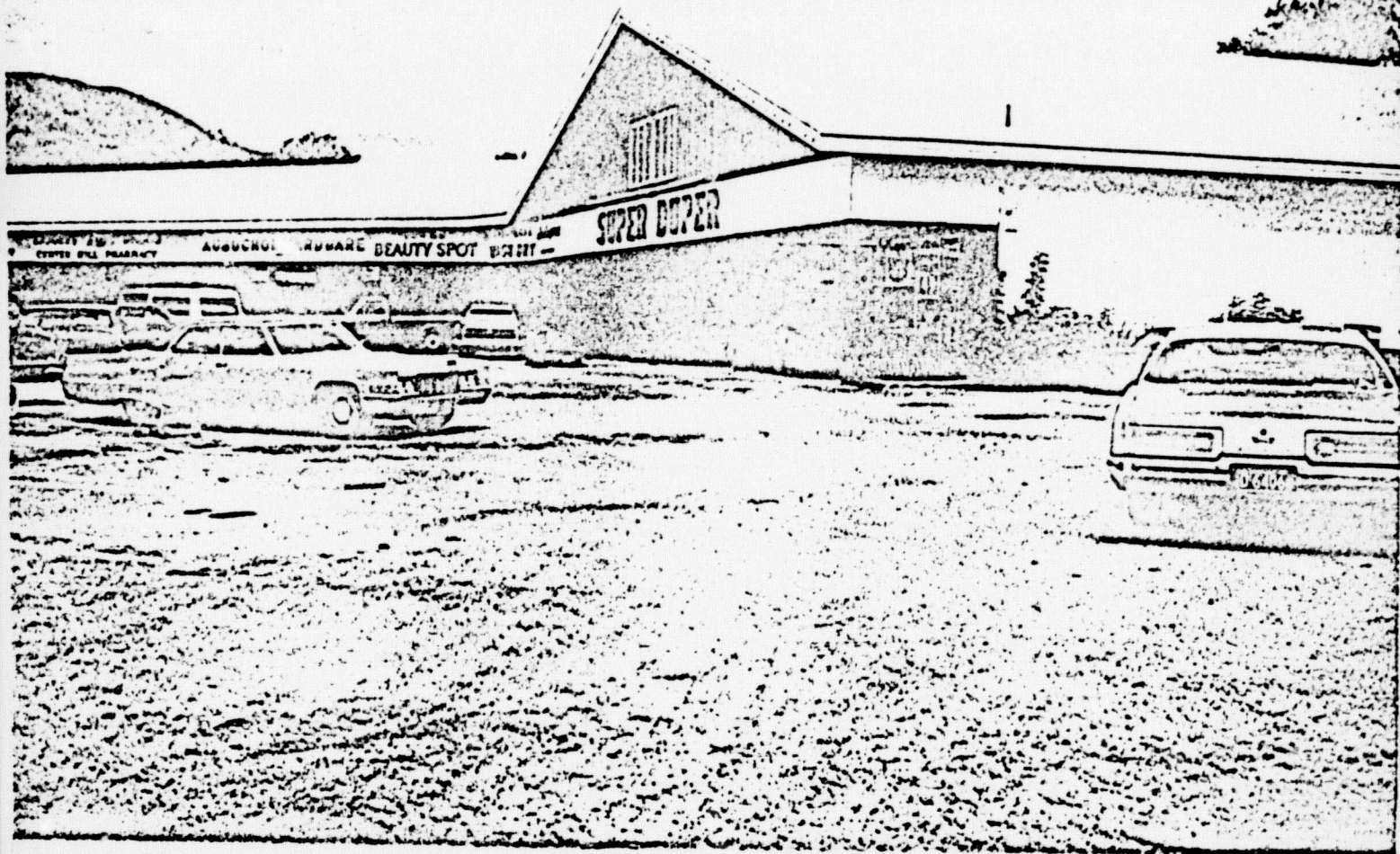
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ANSWERED BY

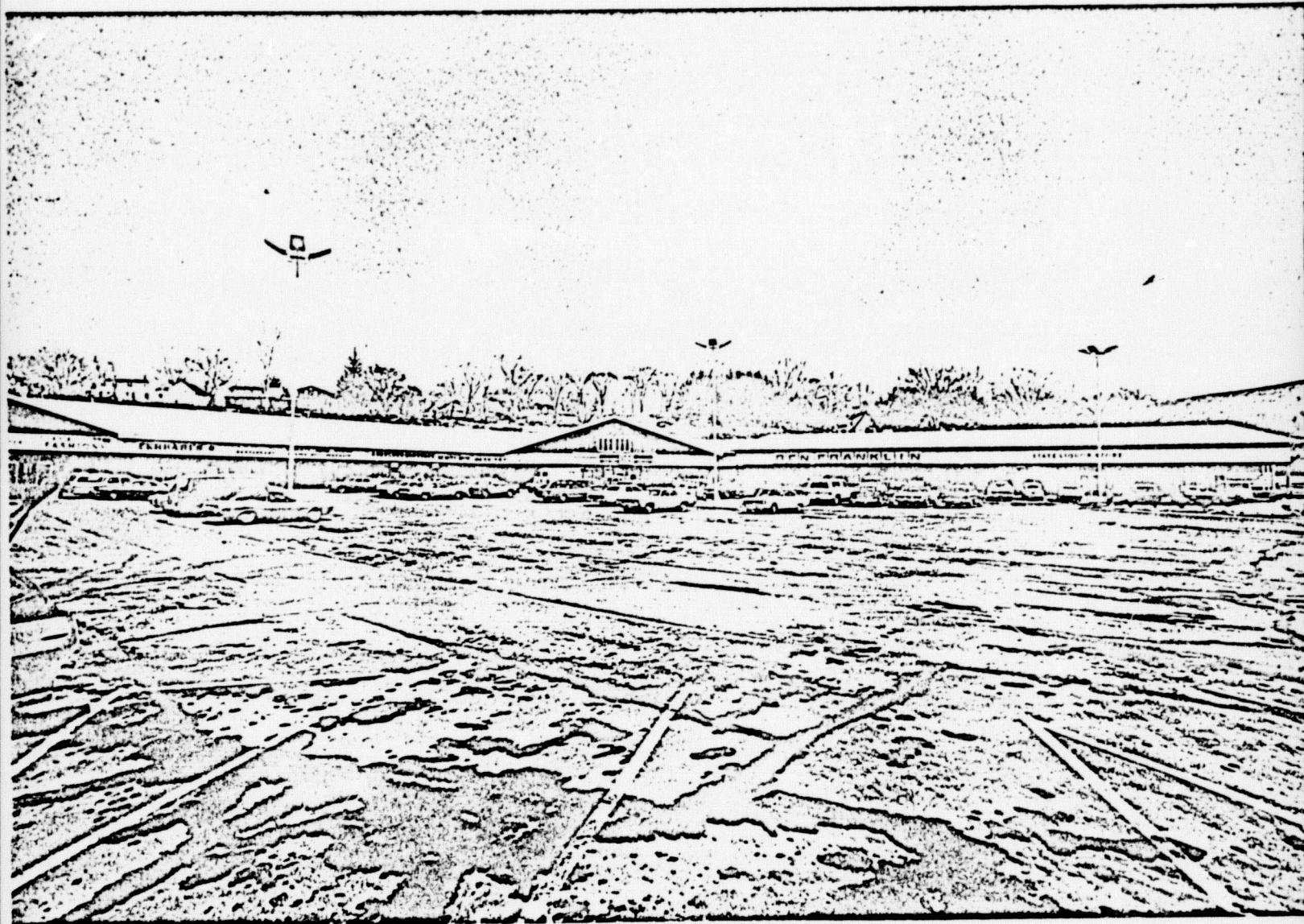
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FORM NO. P-31283  
AVAILABLE FROM BUSINESS ENVELOPE MANUFACTURERS, INC. • BROOKLYN, N.Y. • KNOXVILLE, TENN. • MELROSE PARK, ILL. • ANAHEIM, CALIF.

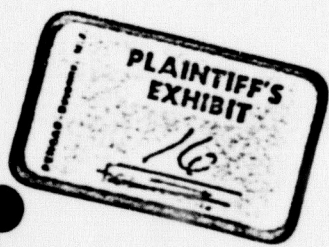
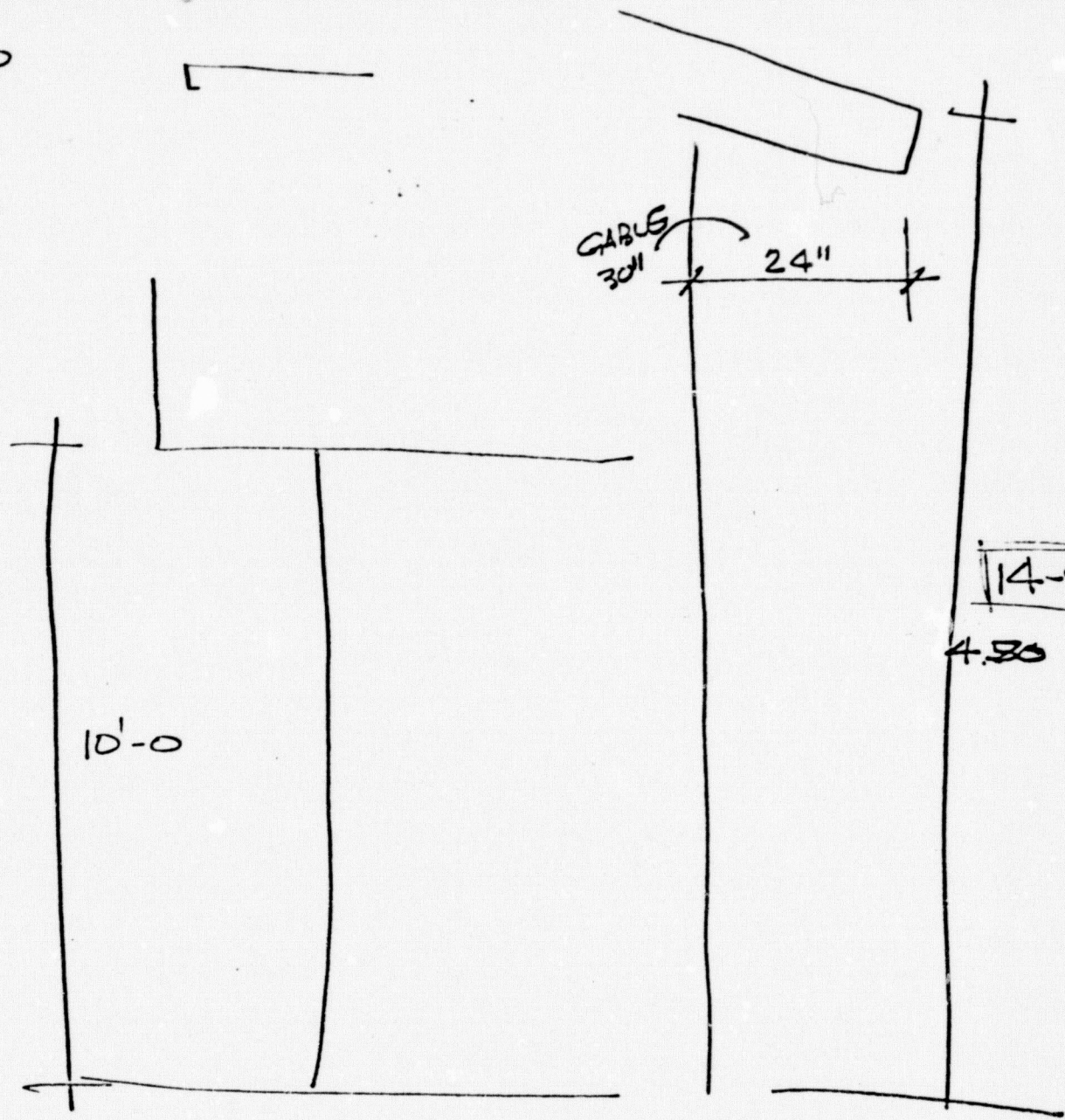






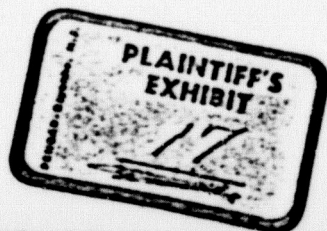
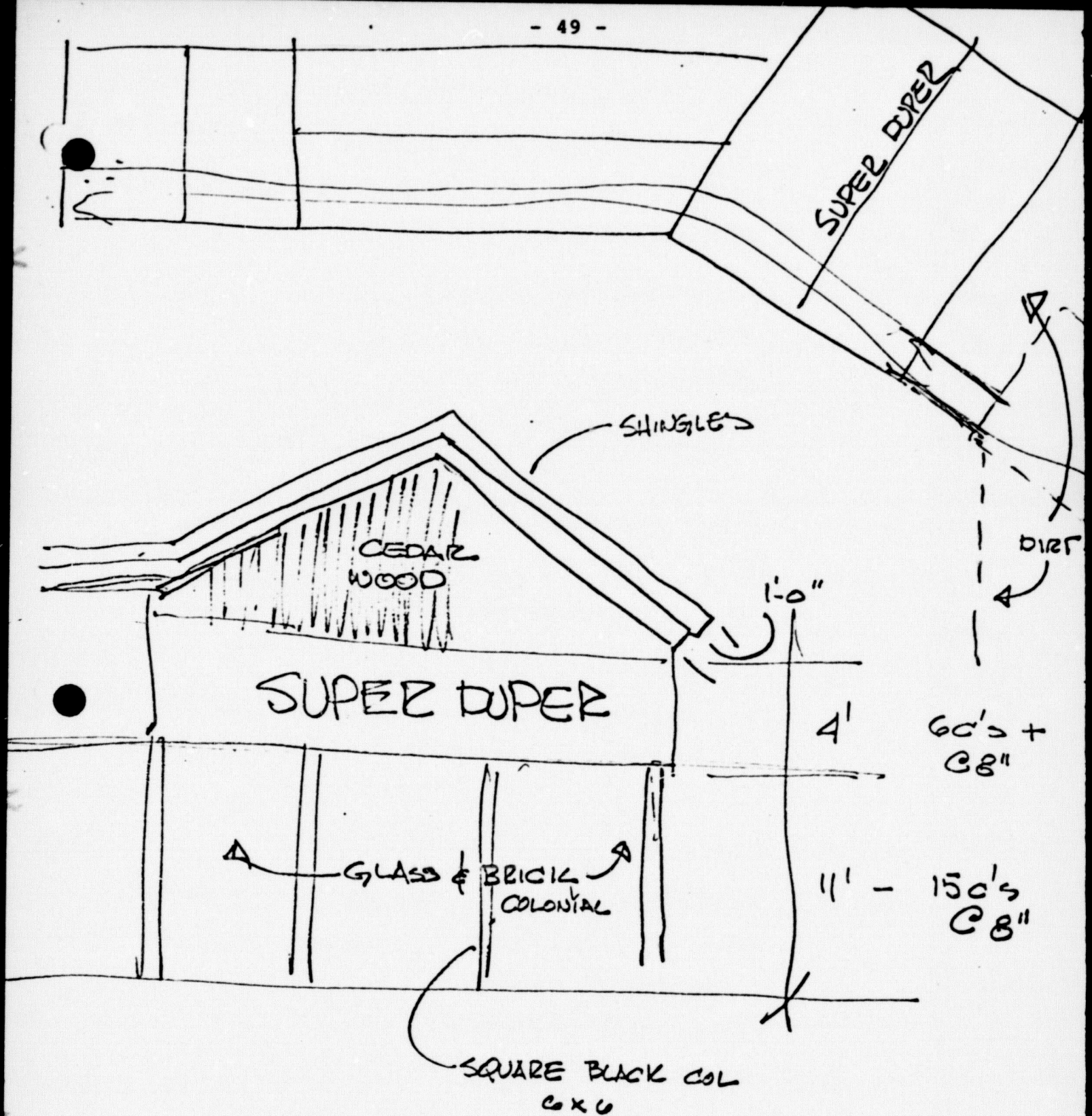


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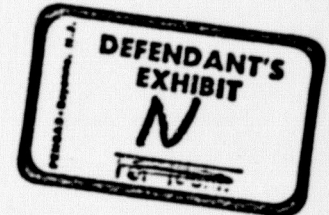
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**IVOW CORPORATION**

P. O. BOX 662  
MANCHESTER, VERMONT 05254



MESSAGE DATE 2/5/73

XXXXXXXXXXXX

Williams & Williams,  
Attorneys At Law  
Poultney, Vermont 05764

Attn. Atty. Howard Seaver:

Dear Howard:

Enclosed as per our telephone conversation today, find copies of the MacMillin correspondence and the matter to be returned to them, i.e. two sets of plans, and one set each of specifications and AIA Contract. The other set of Specs. and copy of contract McAnney refers to was never left with us.

Al. McAnney is just an employee of MacMillin Co., and is only an officer for convenience. Not too long ago, he was in contact with Inland-Ryerson Steel Co., from whom MacMillin Co. holds a franchise under which they construct Inland Ryerson Steel Buildings. McAnney told us he has intentions of taking the franchise away from MacMillin and going into business for himself when he does. We were told to keep this information confidential for he did not want to lose his job in the meanwhile, and also that any work he, McAnney, did on our project, would be carried forth into his own personal venture, and our shopping center job would probably be his first project undertaken on his own. He was never concerned so much regarding MacMillin getting our job, but more so regarding him personally working out something with us. We, as any one else were good listeners, and willing to give the contract to him personally, as well as MacMillin, if his price was right and if he could guarantee us that he could perform to our expectations. McAnney told us he would go through the motions of submitting a MacMillin contract even though he personally might finally be our contractor.



## IVOW CORPORATION

P. O. BOX 662

MANCHESTER, VERMONT

MESSAGE DATE 2/5/73, Cont'd.

REPLY DATE:

On Friday Nov. 24, 1972, McAnney met with us at our Manchester office, and again he had his girl friend present. On this date he had with him the letter from MacMillin dated 11/21/72, the two sets of contract drawings, and the contract and Specs. We told him that day that the MacMillin price was too high and that we would wait for his price to construct for us as an individual, as he previously said he wanted to do. :: We then waited to hear from McAnney regarding his personal estimate. When we received the McAnney letter of Dec. 20, 1972 we first received it as a gesture McAnney was making in behalf of MacMillin, which would be expected of him as a MacMillin employee. Then the holidays came upon us and the letter was forgotten. On Jan. 19th or so we received the attorneys letter of 1/17/73, which we neglected to bring to your attention until now. :: McAnney must have had a change of heart and rather than venture out on his own as he told us he was going to do, he is protecting his job where he is guaranteed a weeks salary. :: In any event as McAnney so advised us, we obtained another price to see how much in line his was. I, as a draftsman and contractor, along with Mrs. Szirbik, furnished McAnney with floor plans, drawings, and ideas, from which McAnney finally arrived at his drawings. We were not enriched by McAnney or MacMillin, but probably in reverse. Much of our time and effort went into negotiations with McAnney, all in good faith. McAnney was attempting to wear two hats, and in the end decided on one, which is most likely the reason prompting his actions in behalf of MacMillin. :: At this point all we want is to give him back what he asked for in his Dec. 20th letter. If McAnney insists is anything further, then we will go all the way using what I have set forth in this letter and more.

Sincerely,

SENT BY \_\_\_\_\_

ANSWERED BY \_\_\_\_\_

IVOW Corporation

William L. Szirbik, Treas.



FORM NO. PH20R3  
AVAILABLE FROM BUSINESS ENVELOPE MANUFACTURERS, INC. • BRONX, N.Y. • KNOXVILLE, TENN. • MELROSE PARK, ILL. • ANAHEIM, CALIF.

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

THE MACMILLIN CO., INC.,  
Plaintiff-Appellee

v.

IVOW CORPORATION & WILLIAM  
SZIRBIK,  
Defendants-Appellants)

CIVIL APPEAL

DOCKET NO. 76-7545

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of February, 1977,  
I served the Joint Appendix herein upon all counsel of record  
by depositing two copies of the same in the United States Mail,  
postage prepaid, addressed as follows:

Philip R. Rosi, Esq.  
Kristensen, Cummings & Price  
5 Grove Street  
P.O. Box 677  
Brattleboro, Vermont 05301

Dated at the City of Rutland, County of Rutland, and  
State of Vermont, this 23rd day of February, 1977.

  
Peter H. Banse